C. The Tenth Circuit's Decision

The Tenth Circuit affirmed. The panel majority first rejected the State's argument that the *Bracker* balancing test should not be applied. Pet. App. 9a. The Tenth Circuit concluded that *Bracker* and *Jones* are not inconsistent in that, under *Jones*, "'if the tribal activity is off reservation that fact *generally* tips the balancing in favor of the state.'" *Id.* at 10a n.6 (quoting *Prairie Band I*, 253 F.3d at 1255 n.9). The Tenth Circuit also concluded that the balancing test is not inapplicable simply because some off-reservation conduct is at issue. Further, unlike the ski resort at issue in *Jones*, the tribal activity that is burdened – the "licensing and titling of vehicles" – "takes place on the reservation" and involves a traditional government function. *Id.* at 14a.

Applying the *Bracker* balancing test, the panel majority determined that "vehicle registration involves a traditional government function," and that the Nation "has a significant interest in regulating motor vehicles on its reservation through the comprehensive PBMVC and through the issuance of tribal registrations and titles." Pet. App. 16a.[2] As the majority explained, if Kansas continues to enforce its registration and title requirements against tribal members, the similar requirements of the PBMVC "'will be effectively defunct.'" *Id.* (quoting Pet. App. 68a). The majority found these tribal interests "linked with strong federal interests in promoting strong tribal economic development, self-sufficiency, and self-governance." *Id.* at 17a. In contrast,

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[2] The State has not contended in this case that the Nation lacks the power to enact a tribal registration and titling program, or that the State's criminal laws prohibit such a program on the Nation's reservation. It is thus undisputed that the Nation's enactment of its motor vehicle code is a valid exercise of its sovereign powers.

there was no evidence that the articulated state interests – public safety and sovereignty – were jeopardized by exempting drivers with tribal registrations. Indeed, "Kansas recognizes license plates from other states, Canada, and Mexico, and tribally issued tags from other jurisdictions, including Minnesota and Oklahoma, without any record-supported safety concerns." *Id.* at 18a. Thus, "[b]alanced against the amorphous and unsupported safety concerns asserted by the State, the Tribe's interest in self-governance by enacting and enforcing its own vehicle registration and titling laws must prevail." *Id.* at 19a.

The panel majority also placed substantial reliance on the discriminatory nature of the Kansas policy, concluding that "[c]ertainly, the discriminatory effect of Kansas' motor vehicle registration and titling laws as applied to the Tribe strengthens the Tribe's claim that the *Bracker* balancing of interests inquiry favors them." Pet. App. 11a.

Judge McConnell concurred. Pet. App. 25a-31a. In his view, a discrimination analysis under *Jones* rather than the balancing test of *Bracker* was applicable. He concluded, however, that the State could not survive the discrimination analysis because the State's registration and titling policy was *not* "non-discriminatory." *Id.* at 29a. Judge McConnell emphasized that under the Kansas registration policy, "residents of Missouri, Newfoundland, or Singapore can drive on Kansas roads without being forced to register," as can members of "Indian tribes from outside of Kansas." *Id.* at 29a. Indeed, "out of the universe of non-Kansas vehicles that appear on Kansas highways," the only non-exempt group is "Kansas-based Indian tribes." *Id.* at 29a-30a. Judge McConnell rejected the State's purported public safety justification for this discrimination because Kansas had not taken any steps – by amending its titling statute or otherwise

– to address safety concerns with respect to any other jurisdiction. Judge McConnell also noted in this regard that his "analysis comports with the Ninth Circuit's approach in [*Cabazon IV*]," which had invalidated California's refusal to permit tribal law enforcement vehicles to display emergency lights when law enforcement vehicles from other jurisdictions were permitted to do so. *Id.* at 31a. Judge McConnell thus concluded that the Kansas policy was "a discriminatory application of state law that violates the [*Jones*] standard." *Id.*[3]

REASONS FOR DENYING THE PETITION

1. Petitioners' principal contention is that the decision below creates a split of authority as to whether "off-reservation" enforcement of "nondiscriminatory" state motor vehicle codes is properly evaluated under the *Bracker* framework – which requires courts to balance federal, state, and tribal interests to determine whether state regulations affecting Indians are preempted by federal law or unduly infringe upon tribal sovereignty.[4] According to the State, the

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[3] As Judge McConnell noted, the State expressly disclaimed any interest in generating revenue as a basis for imposing registration requirements on the Nation, choosing to rely exclusively on public safety and sovereignty as justifications for its discrimination. *See* Pet. App. 30a n.2.

[4] On October 3, 2005, the Court will hear oral argument in *Wagnon v. Prairie Band Potawatomi Nation*, No. 04-631, which involves a challenge to Kansas' motor fuel tax, as applied to fuel sold and delivered to an on-reservation tribal gas station. Although that case involves the applicability and application of *Bracker*, its resolution is unlikely to affect this case, because, among other things, the Kansas vehicle registration policy at issue here is discriminatory and thus invalid regardless of whether

Bracker framework is limited to situations involving purely on-reservation conduct, and because the Kansas law at issue here involves off-reservation roads, the applicable law is described in *Jones*, in which the Court stated that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to *nondiscriminatory* state law otherwise applicable to all citizens of the State." 411 U.S. at 148-49 (emphasis added).

As discussed below, even if presented, the *Bracker* issue raised by the State is neither the subject of a meaningful split of authority nor otherwise worthy of this Court's review. *See infra* pp. 13-23. But the State's plea for review fails for a more basic reason. As the Tenth Circuit held, the Kansas law at issue is *discriminatory*, and it thus may not be enforced regardless of which analysis the Court applies. The issue pressed by the State – whether "nondiscriminatory state motor vehicle laws, enforced off-reservation, are preempted under the interest-balancing test in [*Bracker*]," Pet. 4 – is simply not presented.

All three judges below concluded that the Kansas policy is discriminatory. Kansas law requires all vehicles driving on Kansas roads to be registered and tilted by the State of Kansas. *See* Kan. Stat. Ann. § 8-142. However, any individual whose vehicle is duly registered and titled by another "state" is exempt from the Kansas requirements, so long as the other "state" extends reciprocal privileges to Kansas drivers. *See id.* § 8-138a. This exemption applies not only to individuals properly registered in other States of the United States, but also to those registered by foreign countries and out-of-state Indian Tribes. *See* Pet. App. 18a.

Bracker applies. Accordingly, there is no basis to hold this case pending resolution of 04-631.

Thus, as Judge McConnell reasoned in his concurrence, the State's interpretation singles out in-state Tribes such as the Nation for impermissibly discriminatory treatment. *See, e.g.*, Pet. App. 31a ("This is a discriminatory application of state law . . . ."). As Judge McConnell explained, the State's purported safety and sovereignty rationales – the only rationales invoked by the State, *see supra* n.3 – fail to justify the State's discriminatory policy, because "Kansas recognizes [other] foreign vehicles without reference to any safety standards," and thus imposes "on residents of Kansas-based reservations a requirement that it does not impose on residents of any other jurisdiction." Pet. App. 30a-31a.

The panel majority similarly recognized the discriminatory nature of State's registration and title policy, concluding that "the discriminatory effect of Kansas' motor vehicle registration and titling laws as applied to the Tribe strengthens the Tribe's claim that the *Bracker* balancing of interests inquiry favors them." Pet. App. 11a. Although it did not expressly adopt the discrimination analysis used by Judge McConnell, the majority did "not disagree with the concurrence's discrimination analysis," which "may very well be an additional appropriate analysis in the instant case." *Id.* at 20a.[5]

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[5] As Judge McConnell observed, the State "strenuously argued in [the Tenth Circuit] that the [*Jones*] discrimination test, rather than the *Bracker* balancing test, applies to this case," although it "failed to offer a persuasive argument why [the State] should *prevail* under the [*Jones*] test" – as the Nation argued below. Pet. App. 27a n.1. Thus, although the Tenth Circuit applied the *Bracker* balancing analysis, the discrimination issue was also properly presented and considered.

The State nevertheless pretends as if that analysis never happened. Indeed, the State's petition repeatedly describes its policy as "nondiscriminatory," Pet. 4, 5, 6, 10, 12, 13, 16, and even raises the specter of the Tenth Circuit's ruling being used to strike down "an otherwise lawful, nondiscriminatory State law imposed off-reservation," *id.* at 4, apparently oblivious to the Tenth Circuit's discrimination-based reasoning and Judge McConnell's concurrence. But as all members of the Tenth Circuit panel recognized, the State's insistence that the Kansas policy is "nondiscriminatory" does not make it so. Regardless of whether *Jones* or *Bracker* controls (assuming such a dichotomy), the State's discriminatory registration policy is unenforceable against tribal registrations. The State's petition is thus not an appropriate vehicle for delineating the line, if any, between these two cases.

Nor is the question whether the Kansas policy is discriminatory independently worthy of review. That question turns on a fact-specific analysis of the Kansas policy, making it an inappropriate candidate for certiorari. Moreover, there is no conflict among the lower courts on this issue. Indeed, the only other court facing an analogous situation concluded that the state policy there at issue was discriminatory. In *Cabazon IV*, the Ninth Circuit considered the validity of a provision of California's vehicle code that prohibited the Cabazon tribal police vehicles from displaying emergency light bars, while permitting the display of such bars by California local law enforcement vehicles, as well as law enforcement vehicles of the federal government, bordering States, and even private security companies. *See* 388 F.3d at 698-99. The Ninth Circuit concluded that the State's enforcement of its light bar provisions against the Cabazon's law enforcement vehicles was discriminatory

under *Jones* and was therefore preempted by federal law. *See id.* at 701 (noting that California "discriminates against the Tribe").

Both the panel majority and Judge McConnell's concurrence cited the Ninth Circuit's discrimination analysis with approval. Indeed, the panel praised as "sound" the Ninth Circuit's "analysis regarding the discriminatory effect of the State's motor vehicle code" in *Cabazon IV*. Pet. App. 11a. And Judge McConnell noted that his "analysis comports with the Ninth Circuit's approach in [*Cabazon IV*.]." *Id.* at 31a. The discrimination at the core of this case thus undermines the State's plea for review.

2. The State's petition should also be denied because this case does not, as the State claims, present the question whether *Bracker* "applies" to off-reservation state regulations. This is so, because, as the panel majority ruled, this is not an "off-reservation" case. Rather, this case – although complicated by "the transitory nature of motor vehicles," Pet. App. 9a – ultimately concerns a state policy that nullifies the tribal "licensing and titling of vehicles," which "takes place on the reservation," *id.* at 14a. Thus, "[e]ven though this case implicates the off-reservation activity of driving on Kansas roads when vehicles leave the reservation for various reasons," the majority "'deem[ed] it an on-reservation case for purposes of preemption because the essential conduct at issue occurred on the reservation.'" *Id.* (quoting *In re Blue Lake Forest Prods., Inc.*, 30 F.3d 1138, 1141 (9th Cir. 1994) (classifying a case as "on-reservation," even though it "implicates an off-reservation relationship between the two non-Indian actors," where "the Indian enterprise at the heart of this dispute – the timbering lands – is located on, not off, the reservation")).

Thus, the panel majority did not purport to apply *Bracker* to exclusively off-reservation activity – notwithstanding the State's repeated claims to the contrary. *See* Pet. 4-11. Indeed, the majority even stated that it did "not necessarily disagree with [the State's] statement that the '[*Bracker*] balancing of interests test [is inapplicable] when the activity sought to be regulated by the State takes place off reservation land.'" Pet. App. 13a-14a (quoting the State's appellate brief; second and third brackets in original). The core of the State's challenge is thus that the majority erred in its fact-bound conclusion that this case is properly viewed as an "on-reservation" case. Such error correction is not a proper basis for this Court's review.

Moreover, the majority got it right. The record evidence is undisputed that if the State enforces its registration requirements against tribal vehicles, the Nation's "'motor vehicle code will be effectively defunct.'" Pet. App. 16a (quoting district court); *see, e.g.*, *id.* at 59a, 74a-75a (district court findings). In light of the devastating on-reservation consequences of the State's refusal to permit the use of tribal registrations off-reservation – the effective nullification of the Nation's sovereign power to enact a motor vehicle code and regulate its government and members – there is no reason to question the panel majority's sound determination that this is at base an "on-reservation" case.

3. Review by the Court is unwarranted even were this case to involve a nondiscriminatory state policy applied to "off-reservation" conduct because the application of *Bracker* to such a policy is not – as the State contends – "directly contrary to the repeated statements and holdings of this Court." Pet. 5. Indeed, far from endorsing the State's approach, the Court has repeatedly *rejected* arguments that the *Bracker* analysis does not apply when the specific

conduct regulated by a State occurs off the reservation. For example, in *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995), the Court contemplated the application of the *Bracker* balance-of-interests analysis where the legal incidence of a state tax is placed on the off-reservation "wholesalers who sell to the Tribe." *Id.* at 459. That approach is consistent with the Court's rejection a decade earlier of a "'legal incidence'" test in place of applying *Bracker* in the tax context, "under which legal incidence and not the actual burden of the tax would control the pre-emption inquiry." *Ramah Navajo Sch. Bd. Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 844 n.8 (1982); *see, e.g., Department of Taxation & Fin. of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 73-74 (1994) (applying balancing analysis to obligations imposed on off-reservation wholesalers).

Indeed, at least a century of precedent endorses the common-sense notion that off-reservation state regulation can impermissibly infringe on-reservation tribal sovereign interests. In *Winters v. United States*, 207 U.S. 564 (1908), for example, the United States successfully sued to prevent the building of off-reservation dams and reservoirs that would have limited water flows to the reservation. *Id.* at 576; *see Arizona v. California*, 373 U.S. 546, 598-601 (1963). The same principle is reflected in the fishing cases. In *United States v. Winans*, 198 U.S. 371, 379 (1905), for example, the Court enjoined the use of a "fishing wheel" on private property off the reservation when that wheel unduly restricted the ability of the Tribe to fish at its "usual and accustomed places." And in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), this Court held that neither the Tribe nor the State could "rely on the State's regulatory powers or on

property law concepts to defeat the other's right to a 'fairly apportioned' share" of the fish. *Id.* at 682; *see id.* at 679-85 (discussing cases).[6]

The State would use the reservation border to immunize off-reservation state regulations from preemption, no matter how devastating the effect on tribal-self government. For example, as here, the State could effectively nullify a tribal motor vehicle code – enacted pursuant to the Nation's sovereign right to control its members and territory – by refusing to recognize tribal registrations off-reservation, thus forcing tribal members to eschew tribal registration if they intend any off-reservation travel. This Court, however, has repeatedly rejected such an approach, which would allow Tribes to exercise sovereign authority "only at the sufferance of the State." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 338 (1983). Rather, in situations where "both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions," this Court "resolve[s] th[e] conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected." *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 179 (1973).

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[6] The State places great weight on *Nevada v. Hicks*, 533 U.S. 353 (2001), for its claim that states have *carte blanche* to regulate the off-reservation activities of Indians. Pet. 7-9. However, as the Tenth Circuit explained, *see* Pet. App. 11a-15a, the principles announced in *Hicks* concern the limits of *tribal* power to reach out and regulate the conduct of nonmembers, whereas the question here concerns the scope of *federal* power to limit state interference with a Tribe's exercise of its sovereign powers. *Hicks* is thus fully consistent with (and did not purport to affect) the *Bracker* framework in a situation like this. Unsurprisingly, the State does not even try to allege a split on this issue.

That the threat to the Nation's sovereign powers is a central feature of this case also shows why *Jones* does not establish a categorical rule against preemption for any off-reservation activity, as the State claims. *Jones* involved state taxation of Indians who ventured off the reservation to build a ski resort. In that case, there could be no claim that the tribal sovereign power to regulate on the reservation was effectively nullified by the off-reservation state tax. As the Tenth Circuit recognized, the Court in *Jones* simply had no occasion to consider a context – such as the one presented here – in which an ostensibly off-reservation state regulation effectively nullifies a core aspect of on-reservation tribal self-government.[7]

The State's approach is similarly at odds with the protections afforded Tribes by the Indian Commerce Clause. *See, e.g.*, *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 157 (1980) (acknowledging the Clause's "role to play in preventing undue discrimination against, or burdens on, Indian commerce"). The contours of the constitutional protection are determined by the extent of the burden on Indian commerce and the importance of the tribal, state, and federal interests at stake – not by "where" the State imposes the

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[7] The Court in *Jones* stated that, "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have *generally* been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." 411 U.S. at 148-49 (emphasis added). The Tenth Circuit harmonized this passage from *Jones* with *Bracker* and its progeny to mean that "'if the tribal activity is off-reservation that fact *generally* tips the balancing test in favor of the state.'" Pet. App. 10a n.6 (quoting *Prairie Band I*, 253 F.3d at 1255 n.9).

burden.[8] The State's approach, in which federal and tribal interests become *entirely irrelevant* so long as the State enforces its offending regulation "off-reservation," cannot be reconciled with the careful balancing of interests that the Clause requires.

Finally, the State exaggerates the consequences of a refusal to restrict the balancing inquiry to purely on-reservation conduct, suggesting that "any off-reservation state regulatory activity is vulnerable." Pet. 11. But that is hardly the case, for it is only where, as here, ostensibly "off-reservation" state regulations devastate the federal and tribal interests in tribal self-government but forward no discernible state interest that the balance will weigh in favor of preemption. The State exaggerates further still in claiming that recognizing tribal registrations will "expose[] the States' system of highway safety and management and regulation of the thousands upon thousands of vehicles on the State's highways to unwarranted vulnerability as a practical matter." *Id.* But Kansas itself recognizes tribal registrations from other states, such as Minnesota and Oklahoma, without any reported negative effects. *See* Pet. App. 18a. Likewise, there are no reports of chaos from the many jurisdictions that choose to recognize in-state tribal registrations without the need for lengthy court battles. *See, e.g.*, S.D. Codified Laws

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[8] Similarly, in the context of the Interstate Commerce Clause, the focus of the inquiry is the effect of the burden on interstate commerce regardless where such burden arises. *See, e.g.*, *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 616 (1981) ("State taxes levied on a 'local' activity preceding entry of the goods into interstate commerce may substantially affect interstate commerce, and this effect is the proper focus of the Commerce Clause inquiry.").

§ 32-5-42; Wash. Rev. Code Ann. §§ 46.16.020, 46.16.022; Wis. Stat. Ann. § 341.409.

4. Not only is the Tenth Circuit's approach fully consistent with this Court's precedent, but there is no split of authority among lower courts warranting review.

To support its claim of a "schism," Pet. 4, the State cites only *one* other court of appeals decision – a Ninth Circuit opinion that the State concedes has been *withdrawn*. *See* Pet. 9 (citing *Cabazon Band of Mission Indians v. Smith*, 249 F.3d 1101 (9th Cir. 2001) ("*Cabazon II*"), *vacated*, 271 F.3d 910 (9th Cir. 2001)). *Cabazon II* was an earlier iteration of the challenge to the discriminatory California law that prohibited the display of "light bars" by in-state tribal law enforcement vehicles. Over a dissent, the *Cabazon II* panel, in a wide-ranging opinion, found *Bracker* inapplicable and would have sustained California's policy under *Jones*. *See* 249 F.3d 1110. The Ninth Circuit's *Cabazon II* opinion – "sound" or not, Pet. 9 n.3 – was later withdrawn, and superseded by *Cabazon IV*, which concluded that the California policy was discriminatory and could not be sustained under *Jones*. *See Cabazon IV*, 388 F.3d at 701.

The State's narrow focus on *Cabazon II* and studied failure to discuss *Cabazon IV* or the discrimination analysis in the Tenth Circuit's opinion is telling. For *Cabazon IV* creates no "palpable conflict," Pet. 11, with the Tenth Circuit's decision here. Indeed, the Ninth Circuit's reasoning and result in *Cabazon IV* largely track the Tenth Circuit's decision at issue here. To begin with, both decisions reach the same conclusion – that States may not enforce discriminatory provisions of their motor vehicle codes against in-state Tribes where tribal sovereignty is jeopardized. Furthermore, although the two courts purport to

apply different analytical frameworks (*Jones* and *Bracker*), in reality each court relies on *both* cases to reach its decision. For example, although the Ninth Circuit grounded its *Cabazon IV* decision in the "discrimination" language in *Jones*, it also weighed federal and tribal interests in determining that the California policy was invalid. As the Ninth Circuit explained, the state policy both "discriminates against the Tribe *and* unduly burdens its ability to effectively perform its on-reservation law enforcement functions, thus frustrating the federal policy supporting tribal self-government." 388 F.3d at 701 (emphasis added). A pure "discrimination" framework would not be concerned with such reasoning. Similarly, the Tenth Circuit's interest-balancing in this case relied on the discriminatory nature of the exemptions from the Kansas registration requirement: "Certainly, the discriminatory effect of Kansas' motor vehicle registration and titling laws as applied to the Tribe strengthens the Tribe's claim that the *Bracker* balancing of interests inquiry favors them." Pet. App. 11a.[9]

In sum, what is more noteworthy than the reconcilable differences in doctrinal approach between the Ninth and Tenth Circuits is that *both* courts agree that state motor vehicle codes cannot be enforced against Tribes in a discriminatory manner or as to jeopardize the core exercise of tribal sovereignty. Indeed, both courts weigh similar

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[9] Notably, the State's petition does not challenge the Tenth Circuit's *application* of the *Bracker* framework – and for good reason. Under *Bracker*, and for reasons similar to those articulated by the Ninth Circuit in *Cabazon IV*, the State may not refuse to permit the use of vehicle registrations issued by the Nation. Because the decision below and *Cabazon IV* reach essentially the same result, there is certainly no conflict in the lower courts about the invalidity of discriminatory laws such as the one at issue here.

factors – namely, the relevant state, federal, and tribal interests – in reaching that conclusion. There is simply no "palpable conflict," Pet. 11, warranting this Court's review.

5. The State's fallback ground for certiorari is a request that this Court overrule the preemption analysis articulated in *Bracker* for *all* situations – both on- and off-reservation – for the sake of clarity. *See* Pet. 12-18. There is, of course, no conflict among lower courts on this question. There is no justification for granting the State's radical request.

For 30 years, this Court has consistently applied *Bracker*'s synthesis of 200 years of Indian law, including in three recent unanimous opinions. *See, e.g.*, *Arizona Dep't of Revenue v. Blaze Constr. Co.*, 526 U.S. 32, 37 (1999); *Chickasaw*, 515 U.S. at 458 (unanimous on this issue); *Milhelm Attea*, 512 U.S. at 73. In these circumstances, this Court demands a "compelling justification" before "depart[ing] from the doctrine of *stare decisis*." *Hilton v. South Carolina Pub. Ry. Comm'n*, 502 U.S. 197, 202 (1991).

There is simply no reason to reconsider this controlling law. The status of Tribes remains "anomalous" and "complex." *Bracker*, 448 U.S. at 142. Challenges to state regulations that affect both Tribes and non-members on the reservation still present the "difficult problem of reconciling the plenary power of the States over residents within their borders with the semi-autonomous status of Indians living on tribal reservations." *Ramah*, 458 U.S. at 836-37 (internal quotation marks omitted). And Indian law still operates against the backdrop of "'tribal sovereignty' and the federal commitment to tribal self-sufficiency and self-determination." *Mescalero*, 462 U.S. at 334. It is for these reasons that the Court has long eschewed "standards of pre-emption that have developed in other areas of the law" –

namely, an express preemption standard – instead endorsing *Bracker*'s "flexible pre-emption analysis sensitive to the particular facts and legislation involved." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989).

The State's main argument for discarding *Bracker*'s preemption framework is its claim that the balancing test "is simply unworkable." Pet. 12. But this Court has had little trouble with its application. *See, e.g., Milhelm Attea*, 512 U.S. 61 (unanimous opinion); *see also Ramah*, 458 U.S. at 846 (noting that this Court's "precedents announcing the scope of pre-emption analysis in this area provide sufficient guidance"). And the State completely fails to substantiate its bald assertion that the *Bracker* framework "has created uncertainty and confusion in the lower courts." Pet. 18. Indeed, despite its rhetoric, the State cites only one Ninth Circuit tax case that it deems confusing. Pet. 13-16.

Moreover, this Court has long recognized that, given the unique history and complicated interests at stake, ease of application is not the dominant consideration in Indian law. *See, e.g., Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514 (1991) (noting that "sovereign immunity bars the State from pursuing the most efficient remedy"). The State's cries for "clear guidance, clear lines of demarcation and clear, readily applicable results," and its exaltation of categorical rules thus ring hollow, Pet. 18, for "[o]nly rarely does the talismanic invocation" of "rigid conceptions of state and tribal sovereignty shed light on difficult problems." *Colville*, 447 U.S. at 168 (Brennan, J., concurring); *see also Ramah*, 458 U.S. at 846 (rejecting categorical rule in favor of nuanced balancing of interests).

Eliminating balancing as the State urges would have devastating consequences, spurring state regulation that would threaten tribal enterprises and even entire tribal regulatory schemes, such as those approved by the Court in *Bracker* and its progeny. It also would overturn significant precedent from this Court, including the Court's several cases applying *Bracker*. There is simply no need – or reason – to eviscerate the policy of promoting and protecting the interest in tribal self-government that Congress has long embraced.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court of the United States

JOAN WAGNON, in her official capacity as Secretary, Kansas Department of Revenue, *et al.*,

Petitioners,

v.

PRAIRIE BAND POTAWATOMI NATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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REPLY BRIEF FOR PETITIONER

Respondent advances two primary reasons why certiorari should not be granted in this matter: 1) the Kansas statute at issue was found by the court of appeals to be discriminatory, and thus the issue of whether enforcement of a non-discriminatory State law off-reservation is subject to balancing under *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) is "simply not presented." (Opp'n 10); and, 2) *White Mountain Apache* balancing applies with preemptive force against Kansas law because the essential activity at issue (Respondent's issuance of tribal license plates) occurs on-reservation. (Opp'n 13). None of Respondent's contentions have merit.

First, the district court determined that the issue in this case is whether the "doctrines of federal preemption and Indian sovereignty act as barriers to the State's exercise of its regulatory power. (Pet. App. 56, 70 n.115). The court of appeals, while speculating that the Kansas law might be discriminatory, ultimately rested its decision on preemption grounds because the case was not tried on grounds of discrimination, nor argued or briefed on such grounds. (Pet. App. 8, 20).

Moreover, the court of appeals itself was split as to the basis for its decision. Two members determined that *White Mountain Apache* balancing was applicable because the essential conduct at issue was Respondent's issuance of vehicle titles and tags on-reservation (Pet. App. 14), while the concurrence correctly determined that Kansas has *not* attempted to assert its jurisdiction over any on-reservation activities (a conclusion not disputed by the majority). (Pet. App. 26-27).[1]

ARGUMENT

1. As to the question of discrimination, the statute at issue is commonly referred to as a reciprocity statute.[2]

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[1] The concurrence would still rule against Kansas because of its belief that Kansas' statute is discriminatory. (Pet. App. 30-31). A result the majority rejected. (Pet. App. 8, 20).

[2] Kan. Stat. Ann. § 8-138a (Supp. 2001): "The provisions of this section shall apply only to the *nonresident* owner or owners of any motor vehicle

(Continued on following page)

Absent from discussion in any of the decisions below is a forthright acknowledgement that the plain language of the reciprocity statute applies only to nonresidents. There is no dispute that Respondent's members are residents of Kansas. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18, n.10 (1987); *Goodluck v. Apache County*, 417 F.Supp. 13, 16 (D. Ariz. 1975), *aff'd*, 429 U.S. 876 (1976). *See also*, 41 Am. Jur. 2d *Indians* § 22 at 507 (citing *Iowa Mut. Ins. Co. v. LaPlante*). By virtue of their status as residents of Kansas, tribal members simply cannot invoke the reciprocity statute. The inability of any Kansas resident to invoke the reciprocity statute does not, however, cause the statute to be discriminatory.

If the argument of discrimination is that the absence of reciprocity for resident tribal members unduly burdens "Indian commerce," this Court has refused to credit that sort of claim. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989); *see generally* Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 Conn. L. Rev. 1055 (1995).

The failure to extend reciprocity to tribal members does not violate the commerce clause. As the district court noted (and the court of appeals did not dispute) there is no federal legislation in play. (Pet. App. 63). In the absence of federal legislation, a state may rightfully prescribe uniform regulations with respect to its highways for all vehicles including those engaged in interstate commerce. *Hendrick v. Maryland,* 235 U.S. 610, 622 (1915). The state may require registration and licensing of such vehicles and charge reasonable fees. *Id.* Moreover, the state is not automatically barred from applying such laws even if they may significantly touch the political and economic interests of the tribes. *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 157 (1980) (discussing Indian commerce clause).

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constructed and operated primarily for the transportation of the driver or the driver and one or more nonpaying passengers. Such *nonresident* owners, when duly licensed in the state of residence, are hereby granted the privilege of operation of any such vehicle within this state to the extent that reciprocal privileges are granted to residents of this state by the state of residence of such nonresident owner." (Emphasis added.)

Any alleged Fourteenth Amendment claim of discrimination is equally without merit.[3] Kansas' reciprocity statute on its face creates no suspect classification. It does not expressly single Respondent's members out for special treatment or deny them benefits accorded other Kansas residents. Drivers of motor vehicles without Kansas registration and license plates are cited under Kan. Stat. Ann. § 8-142 (Supp. 2001) not because they are members of Indian tribes, but rather because they have failed to comply with a nondiscriminatory Kansas law. *See Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 469 n.9 (1976). *See, Hendrick v. Maryland*, 235 U.S. at 622 (Automobile safety, like other health and safety matters, has traditionally been a matter of state regulatory concern, a traditional "police power.").

Not granting tribal members reciprocity does not violate the Fourteenth Amendment, because no one who is a resident of Kansas can claim the benefits of the reciprocity statute.[4] It is on this point that Respondent's reliance (and the concurrence in the decision below) on *Cabazon Band of Mission Indians v. Smith*, 388 F.3d 691 (9th Cir. 2004) is misplaced.

The Ninth Circuit in *Cabazon* determined that the California statute did not treat the tribe's police force the same as other police forces. *Cabazon*, 388 F.3d 691, 698. In analyzing the California statute, the Ninth Circuit determined that the relevant comparison was between law enforcement agencies. *Id.* 699.

Assuming *arguendo* a discrimination analysis is proper here, the proper analysis of Kan. Stat. Ann. § 8-138a within the context of this case is whether the statute treats *residents* of

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[3] The Equal Protection Clause of the Fourteenth Amendment requires that "all persons similarly circumstanced ... be treated alike." *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

[4] Reliance on *State v. Wakole*, 265 Kan. 53, 959 P.2d 882 (1998) is improper. First, the *Wakole* court never reached the question of discrimination. *Wakole*, 265 Kan. at 59. Second, the *Wakole* court never addressed preemption. Last, the *Wakole* decision reasoned that *Oklahoma* state law recognized the tribal tag in question, and therefore Kan. Stat. Ann. § 8-138a applied, extending reciprocity, not to the tribe, but to the State of Oklahoma. *Id.* at 55. This is a critical distinction from the case at bar.

Kansas who reside on Respondent's reservation, and *residents* of Kansas who reside outside of Respondent's reservation similarly.[5] When analyzed in this context, it is clear that no resident of Kansas (whether residing within or without Respondent's reservation) can claim reciprocity under Kan. Stat. Ann. § 8-138a. The reciprocity statute at issue here treats all Kansas residents equally. There simply is no discrimination present, and Respondent's assertion to the contrary is devoid of merit.

2. It is clear from the decisions below that Kansas has not in any fashion attempted to regulate or prohibit any on-reservation activity.[6] All that Kansas has ever maintained is that tribal tags and titles do not supplant Kansas license tags and titles off-reservation. In the context of this case, what Respondent requires of its members on-reservation is of no interest to Kansas.

To get around the fact that Kansas was not attempting to regulate on-reservation activity (Pet. App. 26-27), the majority was forced to conclude that the essential conduct at issue is

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[5] For discrimination purposes, it would be improper to compare Respondent to states. Indian tribes are not states. *United States v. Kagama*, 118 U.S. 375, 381-82 (1886). Tribal reservations are not states. *White Mountain Apache*, 448 U.S. at 143. Further, the term "state" for reciprocity purposes is defined by Kan. Stat. Ann. § 74-4305 (Supp. 1992) as: "a state, territory or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a foreign country and a state or province of a foreign country and shall have the same meaning in other statutes of this state relating to interstate relations for licensing of vehicles." Respondent is not any of these either.

[6] Respondent has argued that if Kansas is allowed to enforce its laws off-reservation, its ability to require tribal members to obtain tribal tags and titles will be defunct (Pet. App. 16). If Respondent's contention is that it has *no* ability to require its members to pay for a tribal tag or title, then the question becomes, how serious is its alleged governmental need to regulate who is on their reservation, and just what governmental power does it truly possess? If on the other hand Respondent contends that holding both tribal and State plates is more expensive and inconvenient for its members, that is simply irrelevant to the analysis. There are numerous instances in which persons are required to hold multiple licenses and pay multiple fees to different governmental entities. For example, dealers in alcohol, tobacco and firearms must pay for and hold various federal, state and local licenses. Hunters must pay for and possess both a federal and state license to hunt migratory waterfowl.

Respondent's issuance of tags on its reservation (Pet. App. 14). In support of its conclusion, the court below cited only *In re Blue Lakes Forest Prods., Inc.*, 30 F.3d 1138 (9th Cir. 1994).

Blue Lakes is clearly distinguishable. First, *Blue Lakes* concerned the harvesting of timber from lands held in trust by the United States for the tribe in question. *In re Blue Lakes* at 1139-40. The United States' interests in timbering on reservations is extensive. *White Mountain Apache*, 448 U.S. at 149. *See e.g.* 25 U.S.C. § 407 and 25 C.F.R. § 163. In this case, there is no federal legislation comparable to that in *Blue Lakes*. Second, there was a contract entered into between the tribe and the United States with respect to the severance and sale of the timber. *Blue Lakes*, 30 F.3d at 1139-40, 1141. No such contract exists in this case. *Blue Lakes* is a unique case expressly limited to its facts, and its analysis and conclusion have no application here.

The decision below is further suspect because of the activity the court of appeals chose to balance. As previously noted, the court below held the "essential conduct" for balancing purposes was Respondent's issuance of tags and titles. (Pet. App. 14). But Kansas has never attempted to regulate or bar that activity. When reviewing the balancing cases, they all concern an *on-reservation* activity that the state has overtly tried to tax, regulate or bar.[7] There is no controlling authority to support the court of appeals conveniently shifting the analysis away from what Kansas is attempting in fact to do (enforce its vehicle code off-reservation) to what Kansas is not attempting to do (regulate Respondent's issuance of its titles and tags), simply to get the result it sought to reach.

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[7] *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160, 161 n.1 (1980) (sale of tractors *on* reservation); *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 458 U.S. 832, 836 (1982) (construction of an *on* reservation tribal school); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 343-44 (1983) (application of state hunting and fishing laws to nonmembers of the tribe *on* reservation); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 205-06 (1987) (regulation of tribal bingo *on* reservation).

Respondent's assertion that there is no split of authority (Opp'n 19) is palpably inaccurate. Within the panel below there is a split. The majority held that *White Mountain Apache* balancing applies to preempt the Kansas statute, whereas the concurrence determined it did not. Respondent's positing that the reasoning and result in the Ninth Circuit decision in *Cabazon Band of Mission Indians v. Smith*, 388 F.3d 691 (9th Cir. 2004), "largely track the Tenth Circuit's decision at issue here." (Opp'n 19), is simply wrong. The court in *Cabazon* rejected *White Mountain Apache* balancing because the activity being regulated by the state occurred off-reservation, as it does here. *Cabazon*, 388 F.3d 691, 698. The *Cabazon* court's analysis and holding went to discrimination. Thus, there remains a split between the Tenth and Ninth Circuits as to whether *White Mountain Apache* balancing is proper when the activity being regulated by the state occurs off-reservation.

Further, requiring Kansas to extend reciprocity to Respondent's license plates runs afoul of *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973), which established the right of States to impose nondiscriminatory laws on the off-reservation conduct of tribes and their members. The practical effect of the decision below is to give extraterritorial reach to Respondent's authority – a result that is inconsistent with *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). Extending tribal authority in such a manner is doubly problematic here, since it has the effect of subjecting States to the exercise of a tribe's powers – a result the Ninth Circuit has found untenable. *Montana Dep't of Transp. v. King*, 191 F.3d 1108 (9th Cir. 1999); *Montana v. Gilham*, 133 F.3d 1133 (9th Cir. 1998). The decision below is at odds with all of the above-cited authority, and merits reversal by this Court.

3. In *Nevada v. Hicks*, 533 U.S. 353 (2001), this Court held that when a state's interests outside the reservation are implicated, it may regulate the activities of tribal members even on tribal land. *Hicks*, 522 U.S. at 361-62 (*citing Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. at 151.).

The decision below limits application of *Hicks* only to those cases where tribal interests attempt to interfere with State officers on-reservation. (Pet. App. 13). The principles *Hicks* espoused are not so limited. *Hicks'* analysis and the precedent it

rests upon address the broader question of the ultimate reach of Indian authority. The logical extension of *Hicks* is that a tribe's authority cannot be extended to preempt off-reservation enforcement of state law. *Hicks* affirmed the vitality of the rule of law expressed in *Mescalero* and *Colville*, and comports with *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 653-54 (2001) and *Montana v. U.S.*, 450 U.S. 544, 563 (1981).[8]

The authority of Indian tribes extends only "over . . . their members and their territory" because their dependent status generally precludes extension of tribal civil authority beyond these limits. *Atkinson*, 532 U.S. at 650; *United States v. Wheeler*, 435 U.S. 313, 326 (1978). A tribe's right to self governance or tribal immunity from state power is divested to the extent it operates independently of its territorial jurisdiction, *i.e.* "Indian Country." *See Solem v. Bartlett*, 465 U.S. 463, 465 n.2 (1984); *DeCoteau v. District County Court*, 420 U.S. 425, 427-28 & n.2 (1975).[9]

Conversely, the decision below now extends tribal authority beyond Respondent's reservation boundaries to preempt

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[8] The Court has recognized that there is a significant territorial component to tribal power and that it has no extraterritorial reach. *Mescalero Apache Tribe*, 411 U.S. at 148-49. *See Atkinson Trading Co.* 532 U.S. 645, 653-54 (2001). In such situations, a "categorical" rule consonant with the scope of state authority in the absence of congressional interdiction governs. As the Court explained seven years prior to *White Mountain Apache*, "tribal activities conducted outside the reservation present different considerations" and that, in such instances, "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries generally have been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973).

[9] Respondent's citation to *Winters v. United States*, 207 U.S. 564 (1908), *United States v. Winans*, 198 U.S. 371 (1905), *Arizona v. California*, 373 U.S. 546 (1963) and *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) are unavailing. Those cases deal with express treaty provisions that are not at issue here, or natural resources of the land, which are likewise not present here. *But see, Organized Village of Kake v. Egan*, 369 U.S. 60, 75-76 (1962). (Involving tribes organized under the Reorganization Act, held that off-reservation activities are within the reach of state law. State regulation of off-reservation fishing certainly does not impinge on treaty-protected reservation self-government.).